

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

RECEIVED

In the Matter of

DOCKET FILE COPY ORIGINAL MAY 29 1997

Amendment of Parts 21 and 74 To Enhance
The Ability of Multipoint Distribution Service
And Instructional Television Fixed
Service Licensees To Engage In Fixed
Two-Way Transmissions

)
) RM-9060
)
)
)
)

Federal Communications Commission
Office of Secretary

REPLY COMMENTS

T. Lauriston Hardin, P.E.
George W. Harter, III
Hardin & Associates, Inc.
1300 Diamond Springs Rd., Suite 600
Virginia Beach, VA 23455
(757) 464-1817

Paul J. Sinderbrand, Esq.
William H. Huber, Esq.
Jennifer A. Burton, Esq.
Wilkinson, Barker, Knauer & Quinn
1735 New York Avenue, NW
Washington, DC 20006
(202) 783-4141

S. Merrill Weiss
25 Mulberry Lane
Edison, NJ 08820-2908
(908) 906-0907

Technical Consultants to the Petitioners

Counsel to the Petitioners

May 29, 1997

No. of Copies rec'd 0411
Per ABCDE

MMB

TABLE OF CONTENTS

EXECUTIVE SUMMARY	iii
I. INTRODUCTION.	1
II. DISCUSSION.	5
A. The Commission Should Summarily Reject Efforts By ISTA And WebCel To Cripple The MDS And ITFS In Order To Increase The Value Of Other Spectrum.	5
1. ISTA's Arguments Are Based On The Flawed Presumptions That IVDS Licensees Were Granted A Monopoly For Providing Return Paths To MDS And ITFS Licensees And That The Commission Is Powerless To Authorize Competition To Service Providers Licensed Through Auctions.	6
2. The Commission Should Reject WebCel's Call For The Commission To Artificially Boost LMDS Auction Values By Abandoning The Commission's Commitment To Regulating ITFS and MDS In The Public Interest.	13
B. Many Of The Concerns Expressed By Commenting ITFS Interests Have Been Addressed In The Proposed Rules.	21
C. Adoption Of Certain Suggestions Advanced By Commenting Parties Would Be Inconsistent With The Objectives Of The Petition.	33
1. The Commission Should Not Restrict Return Paths To MDS Channels 1 and 2/2A.	33
2. The Commission Should Not Preclude Licensees From Consenting To Interference That Would Otherwise Be Prohibited Under The Commission's Rules.	35
3. The Proposed Rules Governing Interference Protection To Response Station Hubs Should Be Retained.	36
4. The Commission Should Reject CTN's Call For An Increase In The Minimum Amount Of ITFS Material An ITFS Licensee Must Transmit.	38

5.	The Commission Should Not Require The Amendment Of Leases That Already Contemplate The Introduction Of Advanced Technology.	39
6.	This Proceeding Is Not The Appropriate Vehicle, And The Record Does Not Support, The Proposed Authorization Of Modulation Techniques Other Than QAM Or VSB.	40
7.	Interference Rules Based Solely On Power Spectral Density and Emission Masks Will Not Offer Interference Protection Akin To That Provided Under The Current Rules.	41
8.	The Petitioners Have Provided The Commission With Sufficient Information To Validate The Methodologies Underlying The Petition.	42
III.	CONCLUSION	49

EXECUTIVE SUMMARY

The comments submitted in response to the Petition for Rulemaking demonstrate beyond peradventure that the Commission should issue a notice of proposed rulemaking proposing the rule changes set forth in the Petition and in the Petitioners' earlier comments.

At the outset, the Commission should summarily reject efforts by ISTA and WebCel to cripple the MDS and ITFS in order to increase the value of other spectrum. ISTA's arguments are based on the flawed presumptions that IVDS licensees were granted a monopoly for providing return paths to MDS and ITFS licensees. A review of the regulatory environment of MDS and ITFS prior to the IVDS auction, coupled with a review of the Commission's pronouncements regarding IVDS, establish that IVDS auction participants had no right to anticipate such a monopoly. Moreover, ISTA's contention that the Commission is powerless to authorize competition to service providers licensed through auctions cannot be squared with a host of Commission decisions, including the Commission's decision to allow ITFS licensees to provide mobile services in competition with the holders of PCS licenses that had already been auctioned.

Similarly, the Commission should reject WebCel's call for the Commission to artificially boost LMDS auction values by crippling the service capabilities of MDS and ITFS. The Commission has recognized in numerous situations that it has an ongoing obligation to regulate in the public interest, and that it must when appropriate afford increased flexibility regardless of whether the beneficiaries secured their licenses by comparative proceeding, lottery or auction.

As a result of the close coordination with the educational community during the preparation of the Petition, many of the concerns now expressed by ITFS licensees have been addressed in the Petition. As the Commission considers the philosophic concerns being raised by some of the comments, it should keep in mind three fundamental precepts of the Petition:

1. No ITFS or MDS licensee can be forced to devote its channels to a cellularized transmission system or return paths without its consent;
2. Any ITFS or MDS licensee that does not desire to participate in a system employing advanced technology is protected against interference from those that do; and
3. Those ITFS licensees that do take advantage of the flexibility proposed in the Petition must still transmit as much ITFS programming as they do today.

In the view of the Petitioners, these three underlying elements are essential to the preservation of the underlying instructional purpose of the ITFS, while at the same time allowing those in the ITFS community with vision and evolving needs to employ advanced technologies to address those needs.

As a result, many of the concerns expressed by commenting ITFS interests have been addressed in the proposed rules. Others propose rule changes (such as permitting channel swaps),

that will advance the objectives of the Petition. However, adoption of certain other suggestions advanced by commenting parties would be inconsistent with the objectives of the Petition.

The Commission should not restrict return paths to MDS channels 1 and 2/2A as one party has suggested, for to do so will preclude many ITFS licensees from enjoying the benefits of flexible use. Nor should the Commission preclude licensees from consenting to interference that would otherwise be prohibited under the Commission's rules. The Commission has consistently recognized that interference consents play an essential role in the development of MDS and ITFS systems, and there is no reason presented for the Commission to alter that view.

The Commission also should reject CTN's call for an increase in the minimum amount of ITFS material an ITFS licensee must transmit. The Commission addressed this issue just last year and agreed with those who demonstrated how an increase in the minimum amount of required programming would be a disincentive to the introduction of advanced technologies. In addition, the Commission should reject the proposal that it require the amendment of leases that already contemplate the introduction of advanced technology.

This proceeding is not the appropriate vehicle, and the record does not support, the proposed authorization of modulation techniques other than QAM or VSB. The proponent of other modulations bears the burden of demonstrating that such modulations can be introduced without interference, and that burden has not been carried.

The Commission should also reject the proposal for interference rules based solely on power spectral density and emission masks. Such rules will not offer interference protection akin to that provided under the current rules, which is a critical element of the proposal.

Finally, the petitioners have provided the Commission with sufficient information to validate the methodologies underlying the petition.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Amendment of Parts 21 and 74 To Enhance)	RM-9060
The Ability of Multipoint Distribution Service)	
And Instructional Television Fixed)	
Service Licensees To Engage In Fixed)	
Two-Way Transmissions)	

To: The Commission

REPLY COMMENTS

The parties listed on Appendix A to the Petition for Rulemaking (the "Petition") that commenced this proceeding (collectively, the "Petitioners"), by their attorneys, hereby submit their reply to the submissions made in response to the Commission's March 31, 1997, *Public Notice* soliciting comment on the Petition and on "how the Commission can amend its rules to permit even broader flexibility than suggested by Petitioners."^{1/}

I. INTRODUCTION.

The Petition (which was submitted on behalf of 111 entities, 65 of whom are active in the ITFS community) and the comments submitted in response to the *Public Notice* evidence overwhelming support for enhancing the ability of Multipoint Distribution Service ("MDS") and Instructional Television Fixed Service ("ITFS") licensees to productively employ their spectrum. Indeed, but for the comments submitted by the Interactive Video Data Trade Association, Inc. ("ISTA") and WebCel Communications, Inc. ("WebCel"), which are transparent anti-competitive

^{1/} "Pleading Cycle Established For Comments On Petition For Rulemaking To Amend Parts 21 And 74 Of The Commission's Rules To Enhance The Ability Of Multipoint Distribution Service And Instructional Television Fixed Service Licensees To Engage In Fixed Two-Way Transmissions," *Public Notice*, RM-9060, DA 97-637 (rel. March 31, 1997).

efforts to cripple MDS and ITFS licensees in order to increase the value of Interactive Video Data Service ("IVDS") and Local Multipoint Distribution Service ("LMDS") authorizations, every party submitting comments in response to the *Public Notice* has supported the concept of affording MDS and ITFS licensees greater technical flexibility in the use of their spectrum.^{2/}

^{2/} See, e.g. Joint Comments of Arizona State Board of Regents on behalf of the University of Arizona, *et al*, RM-9060, at 3 (filed May 14, 1997) ("Generally, the ITFS Parties support the Petition and urge the FCC to move forward with the adoption of a Notice of Proposed Rulemaking") [hereinafter cited as "DL&A ITFS Comments"]; Comments of ComSpec Corp., RM-9060, at 1 (Filed May 14, 1997) ("We applaud and support the extensive work of the Petitioners in compiling an excellent proposal for the integration of compatible two-way fixed digital services into the framework of an existing service.") [hereinafter cited as "ComSpec Comments"]; Comments of Moore County Schools, RM-9060, at 2 (filed May 14, 1997) ("Commenter supports the proposed revisions to Parts 21 and 74 of the Commission's Rules which will permit MDS and ITFS licensees to provide digital two-way services over their frequencies and agrees with the Petitioners that such revisions will enhance the services offered by MDS and ITFS licensees by enabling them to provide Internet access and other two-way communications service offerings"); Comments of the Archdiocese of Los Angeles Education and Welfare Corp., RM-9060, at 2 (filed May 14, 1997) ("The Archdiocese cautiously supports the goal of the Petition -- to afford MDS and ITFS licensees the flexibility to implement spectrally efficient digital transmission techniques to meet marketplace demand for two-way interactive services) [hereinafter cited as "Archdiocese of LA Comments"]; Comments of National ITFS Ass'n, RM-9060, at 3-4 (filed May 14, 1997) ("NIA does not oppose the availability of two-way audio and video. . . . To the contrary, NIA and its members are anxious for such a capability.") [hereinafter cited as "NIA Comments"]; Comments of Schwartz, Woods & Miller on behalf of 15 ITFS licensees, RM-9060, at 2 (filed May 14, 1997) ("Commenters agree that the Commission should move forward with a Notice of Proposed Rulemaking to consider the changes in licensing and regulation of the [MDS and ITFS] recommended by Petitioners") [hereinafter cited as "SW&M ITFS Comments"]; Comments of PACE Telecommunications Consortium, RM-9060, at 4 (filed May 14, 1997) ("The *Petition* has the potential to provide a cost-effective solution to the problem of linking schools and classrooms to the global information infrastructure in a rural setting where the distances between schools is great and traditional telecommunications facilities are unavailable or prohibitively expensive.") [hereinafter cited as "PACE Comments"]; Comments of Catholic Television Network, RM-9060, at 3 (filed May 14, 1997) ("CTN generally supports the concepts underlying the Petition, and recommends their expeditious consideration") [hereinafter cited as "CTN Comments"]; Comments of Northeastern University, RM-9060, at 2 (filed May 14, 1997) ("The capability to provide two-way data transmissions would enhance the services and educational opportunities available to Northeastern's on-campus and corporate receiving locations.") [hereinafter cited as (continued...)]

This wide-ranging support is not surprising, for the Petition was crafted in response to the evolving needs of both the wireless cable and educational communities after extensive consultation with numerous representatives of each.^{2/} The Petition details how the proposed rule changes will

^{2/} (...continued)

“Northeastern Comments”]; Comments of Gulf Coast MDS Service Company, RM-9060, at 4-5 (filed May 14, 1997) (“We are in favor of MDS and ITFS licensees being permitted to provide wireless services other than video and entertainment on a primary basis, which is consistent with [the] emerging policy [favoring flexible use]”); Comments of Caritas Telecommunications, Inc. RM-9060, at 1-2 (filed May 14, 1997) (“Caritas cautiously supports the goal of the Petition -- to afford MDS and ITFS licensees the flexibility to implement spectrally efficient digital transmission techniques to meet marketplace demand for two-way interactive services”) [hereinafter cited as “Caritas Comments”]; Comments of Dallas County Community College District, *et al*, RM-9060, at 2 (filed May 14, 1997) (“The Petitioners have undertaken a difficult task and one that shows tremendous effort and achievement in attempting to develop and articulate service rules that will accommodate novel and innovative use of the ITFS spectrum.”) [hereinafter cited as “DCCC Comments”]

^{3/} Thus, Catholic Television Network (“CTN”) is simply wrong when it asserts that “the proposals in the Petition fail to take into account the needs of ITFS educators.” CTN Comments, at 4. Prior to the submission of the Petition, drafts were widely circulated among ITFS licensees, and educators had numerous opportunities to provide comment. Indeed, the rules proposed by the Petition were modified extensively in response to suggestions received from educators. The comments supporting the Petition submitted by the ITFS community in response to the *Public Notice*, coupled with the fact that the majority of the Petitioners are drawn from the ITFS community, demonstrate beyond peradventure that the rules proposed by the Petition have been carefully crafted to meet the needs of educators. *See supra* note 2. As a result, the Commission should reject CTN’s call for a Federal Advisory Committee in this matter. *See* CTN Comments, at 4. The time required to establish such a committee and for the committee to conduct its business will only delay the adoption of rules that have strong support from most participants. Commissioner Ness had it right when she summarized the Commission’s goals in managing spectrum: “We need to be fair, flexible, and *fast*.” Hon. Susan Ness, “The End of the Beginning (or “Hoopla”),” *Special Commissioner’s Forum*, Wireless ‘96 Convention (March 25, 1996). Establishment of a Federal Advisory Committee would be anathema to fast spectrum management.

Similarly, the extensive pre-filing consultation with the ITFS community, coupled with the large number of ITFS interests that either are Petitioners or have filed comments in support of the Petition, debunk the outrageous assertion by National ITFS Association (“NIA”) that the Petition represents a “hostile takeover” of ITFS spectrum by the wireless cable industry. NIA

(continued...)

respond to the increasing competitive pressure on wireless cable operators to provide their subscribers with two-way communications service offerings.^{4/} And, as the comments filed by Dow, Lohnes & Albertson on behalf of the Arizona State Board of Regents, the Board of Regents of the University of Wisconsin System, California State University, the Ohio State University, Regents of the University of Minnesota, South Carolina Educational Television Commission, State of Wisconsin--Educational Communications Board, and other educators (collectively, the “DL&A ITFS Parties”) confirm:

With appropriate safeguards, the proposed rule changes would increase the flexibility of ITFS licensees to engage in a variety of two-way voice, video and data transmissions (including high speed Internet access). This flexibility could be valuable to the delivery of educational services. Cost-effective two-way voice, video and data communications could enhance the distance learning experience by allowing it to be more truly interactive. Internet access via the 2.5 GHz band could help schools obtain services at costs far less, and speeds far greater, than can now be reasonably anticipated for many schools.^{5/}

^{3/} (...continued)

Comments, at 2. Given the substantial support within the ITFS community for rule changes that will promote the use of ITFS spectrum for innovative two-way services, and NIA’s own admission that it “does not oppose the availability of two-way audio and video,” the Petitioners are at a loss to understand what NIA hopes to accomplish by the shrill tone of its rhetoric. NIA Comments, at 3. While adoption of the proposals advanced by the Petition will undoubtedly result in the evolution of some ITFS facilities to more advanced technology, and while NIA’s leaders may not share in the vision of a more vital ITFS, the supportive comments submitted in this proceeding by members of the ITFS community (many of whom are members of NIA) suggest that NIA’s positions are out of step with the desires of the ITFS community as a whole. As will be discussed in detail below, to the extent that NIA has identified concrete concerns regarding the Petition, those concerns either have been addressed in the Petition, are based on misunderstandings of the Petition or of the technologies involved, or cannot be addressed without effectively crippling the flexibility ITFS licensees want to take advantage of the flexible use policies advocated by the Petition.

^{4/} See Petition, at 4-16.

^{5/} DL&A ITFS Comments, at 3. See also Petition, at 16-18 and *supra* note 2.

In the interest of brevity, the Petitioners will not devote any substantial portion of this pleading to recounting the support for the Petition contained within the record -- the record speaks for itself. Rather, the remainder of this pleading will be devoted to refuting the anti-competitive contentions of ISTA and WebCel and responding to the concerns expressed by the other commenting parties.

II. DISCUSSION.

A. The Commission Should Summarily Reject Efforts By ISTA And WebCel To Cripple The MDS And ITFS In Order To Increase The Value Of Other Spectrum.

In transparent attempts to bolster their uncertain business cases, ISTA and WebCel have both contended that the Commission should refrain from amending its technical rules in order to provide MDS and ITFS licensees greater flexibility in the use of their spectrum. Although these two commenting parties advance somewhat different arguments, they share a common goal — crippling the ability of MDS and ITFS licensees to provide services that might compete with IVDS and LMDS. Such self-serving arguments do not advance the public interest, and should be categorically rejected by the Commission.

1. *ISTA's Arguments Are Based On The Flawed Presumptions That IVDS Licensees Were Granted A Monopoly For Providing Return Paths To MDS And ITFS Licensees And That The Commission Is Powerless To Authorize Competition To Service Providers Licensed Through Auctions.*

With great rhetorical flourish, but without any support in law, ISTA charges that it “would be akin to fraud,”^{6/} a violation of commercial law,^{7/} and “akin to a taking of property without just compensation”^{8/} for the Commission to grant the Petition. Although ISTA’s comments are far from clear, ISTA appears to be basing its position on a contention that the Commission represented and warranted to IVDS auction participants that IVDS, and IVDS alone, would be the sole vehicle by which MDS and ITFS licensees could secure a two-way conduit. The short answer to ISTA is that no such representation or warranty was ever made. In fact, had IVDS auction participants done even a modicum of due diligence, they would have been aware that MDS and ITFS licensees had a plethora of other avenues for response channels.

It is not surprising that ISTA can point to no specific Commission guarantee that only IVDS licensees would be able to provide return path services to MDS and ITFS licensees, for no such statement was ever made. While the Commission certainly permitted IVDS to be used as a return path for MDS and ITFS, it gave no assurance to IVDS auction participants that MDS and ITFS

^{6/} ISTA Comments, at 4.

^{7/} *See id.* at 5.

^{8/} *Id.*

licensees would have to rely on IVDS spectrum for return paths. Indeed, the Commission generally refrained from making any statements regarding the prospects for IVDS.^{9/}

For ISTA even to suggest that IVDS auction participants had a reasonable belief they would have a monopoly over MDS and ITFS return paths defies credulity. As is discussed in detail in the Petition, but totally ignored by ISTA, long before the initial 1994 IVDS auction, the Commission had allocated to MDS and ITFS licensees spectrum at 2686-2690 MHz and at 18 GHz for return paths.^{10/} This fact alone establishes that IVDS auction participants had no basis for believing that

^{9/} For example, in a *Public Notice* issued by the Commission on June 17, 1994 - before the commencement of the first IVDS auction - the Commission specifically declined to make any projections regarding the value of IVDS authorizations. See "Answers to Questions from the June 6, 1994, FCC Bidders Seminar for the Auction of Narrowband Personal Communications Services (PCS) Licenses and Interactive Video and Data Service Licenses," *Public Notice*, at 11 (rel. June 17, 1994).

^{10/} See Petition, at 24-25. "Since 1969, ITFS licensees have been provided with one 125 kHz response channel for each 6 MHz primary channel licensed." 47 C.F.R. §74.939. See *Amendment of Part 74, Subpart I of the Commission's Rules and Regulations Governing Instructional Television Fixed Stations to Provide for the Licensing of ITFS Response Stations in the Band 2686-2690 Mc/s*, 16 R.R.2d 1584 (P&F 1969)(allocating spectrum for ITFS response channels). Similarly, MDS licensees in the 2596-2644 MHz band have long been provided with access to 125 kHz response channels. 47 C.F.R. §21.901(b)(4), (5). H channel licensees were first provided with access to response channels in 1971, when the H channels were formally reallocated from the ITFS to the Operational Fixed Service. See *Amendment of Parts 2 and 74 of the Commission's rules and Regulations to Establish a New Class of Educational Television Service for the Transmission of Instructional and Cultural Material to Multiple Receiving Locations on Channels in the 2500-2690 MHz Frequency Band*, 30 F.C.C.2d 197, 200 (1971). In 1991, however, the Commission allocated the 125 kHz response channels associated with the H channels and MDS channels E3, E4, F3, and F4 for Private Operational Fixed Service use. See *Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands*, 6 FCC Rcd 6792, 6795 (1991). And, for the benefit of all MDS licensees, the Commission's rules provide that "point-to-point radio return links from a subscriber's location to a MDS operator's facilities may be authorized in the 18,580 through 18,820 MHz and 18,920 through 19,160 MHz bands." 47 C.F.R. §21.903(a). See *Establishment of a Spectrum Utilization Policy for the Fixed and Mobile Services Use of Certain Bands Between 947 MHz and 40 GHz*, 56 R.R.2d 1171, 1181 (1984)[hereinafter cited as "MDS Return (continued...)"]

they would have any monopoly on the provision of return paths for MDS and ITFS services. Moreover, as is discussed in the Petition^{11/} and below,^{12/} when the IVDS auction was conducted, as now, the Commission's rules permitted the use of even the 6 MHz MDS channels for "any kind of communications service."^{13/} ISTA's position simply cannot be squared with this broad MDS service definition.

The Commission should recognize, moreover, that ISTA is grossly exaggerating when it contends that "if the FCC were to modify its rules as requested by the Petition, it will have denied IVDS licensees all economically viable uses of its [*sic*] license."^{14/} As a practical matter, Petitioners are unaware of any instance in which an IVDS licensee has contracted to provide return path services for an MDS or ITFS system. That is not surprising, for the capacity of IVDS systems is generally too limited to meet the needs of wireless cable operators and educators. Thus, even assuming for purposes of argument that the Commission were actually to bar IVDS licensees from providing MDS and ITFS return paths (which is not proposed in the Petition), there would be no practical adverse impact on IVDS.

But, of course, a grant of the Petition will not bar IVDS licensees from providing a return path for MDS and ITFS facilities. Indeed, a grant of the Petition will not affect one iota the ability

^{10/} (...continued)
Path Allocation Order"].

^{11/} See Petition, at 23.

^{12/} See *infra*, at 18.

^{13/} See Petition, at 23, *citing* 47 C.F.R. § 21.903(b).

^{14/} ISTA Comments, at 6.

of IVDS licensees to provide the full panoply of services authorized under the Commission's IVDS rules. An IVDS licensee will be able to provide the same services the day after the Petition is granted as it can today. Admittedly, IVDS licensees may face additional competition from MDS and ITFS licensees in the offering of certain low-capacity services once the Petition is granted. A Commission license, however, is an authorization to compete, not a guarantee of success. And what ISTA apparently wants is a monopoly, not an opportunity to compete.

Because a grant of the Petition will not alter the ability of IVDS licenses to provide services under their authorizations, it is absurd of ISTA to contend that a grant of the Petition would render IVDS licenses "not fit for the specific purposes for which ISTA's members purchased them" in violation of commercial law.^{15/} Similarly, ISTA's claim that a grant of the Petition would constitute an unconstitutional taking without just compensation because it "deprives a property owner of economically viable use of his property" is fatally flawed by the fact that IVDS licensees could continue to offer all services they were previously authorized to provide.^{16/}

ISTA's taking argument is based on a misconception that the Commission is not permitted to change or modify settled policies or rules where doing so may affect parties whom it has licensed to employ the radio spectrum.^{17/} At the outset, this claim is fundamentally flawed because the supposed "right" at issue does not constitute a protected property right required to support a

^{15/} See *id.* at 5.

^{16/} See *id.*

^{17/} See *Revision of Rules and Policies for the Direct Broadcast Satellite Service*, 11 FCC Rcd 9712, 9765 (1995) (citation omitted) [hereinafter "*DBS Report & Order*"], *appeal denied*, *DIRECTV, Inc. v. FCC*, 110 F.3d 816 (D.C. Cir. 1997).

constitutional takings claim.^{18/} According to settled law, a Commission license to employ the radio spectrum is not a property right entitled to constitutional protection against a taking.^{19/}

This is hardly surprising, as Section 301 of the Communications Act of 1934, as amended, states that the Commission's primary purpose is to "maintain control of the United States over all the channels of radio transmission," and to provide for the licensing of these channels without conferring ownership rights thereto.^{20/} Similarly, Section 304 provides that before a licensee can receive a grant of a station license, it must "waive[] any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise."^{21/} Although ISTA seems to suggest that licenses issued at auction are entitled to a different analysis, when Congress authorized the use of auctions for the issuance of licenses, it reiterated that "any license issued by the Commission pursuant to section 309 does not vest any property rights in the license holder."^{22/}

Since directly affected licensees cannot raise takings claims when the Commission amends its rules in such a way as to alter the activities permissible under their licenses, IVDS licensees can hardly argue that there has been an unconstitutional taking of their rights when the Commission

^{18/} See e.g., *id.* at 9766, citing *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 54-55 (1986); *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958).

^{19/} *DBS Report & Order*, 11 FCC Rcd at 9766. See also *Democratic Cent. Comm. v. Washington Metro. Area Transit Comm'n*, 38 F.3d 603, 606-07 (D.C. Cir. 1994) (finding "when government entity acts to create property rights yet retains the power to alter those rights, the property right is not considered 'private property,' and the exercise of the retained power is not considered a 'taking' for Fifth Amendment purposes.").

^{20/} 47 U.S.C. § 301. See *DBS Report & Order*, 11 FCC Rcd at 9766.

^{21/} 47 U.S.C. § 304. See *DBS Report & Order*, 11 FCC Rcd at 9766.

^{22/} H.R. Rep. No. 103-111, at 259 (1993).

hardly argue that there has been an unconstitutional taking of their rights when the Commission amends its rules relating to the MDS and ITFS. The Commission “enjoys wide latitude when using rulemaking” to change existing policies, for without such latitude, the Commission would be perpetually bound by policies that may have been appropriate when adopted, but no longer serve the public interest.^{23/} Consequently, because the Commission retains the power to alter any rights it does create by issuance of licenses, any exercise of that power does not constitute an unconstitutional taking.^{24/}

In further support for its takings claim, ISTA contends that its members expended monies at auction in reliance on the assumption that the Commission would refrain from making drastic changes to the rules, and therefore any subsequent modification of the MDS and ITFS rules results in a waste of “the scarce capital available for investment in spectrum-based services.”^{25/} As the Commission noted in its *DBS Report & Order*, the courts have generally rejected arguments that investment-backed expectations give rise to constitutionally protected property interests.^{26/} An inquiry into whether a taking has occurred is made only once it can be established that a property right exists.^{27/} ISTA has failed to identify any property right that may be entitled to the takings clause protection it claims, and therefore cannot invoke such protection.

^{23/} *DBS Report & Order*, 11 FCC Rcd at 9767.

^{24/} *Id.* (citation omitted).

^{25/} ISTA Comments at 6.

^{26/} *DBS Report & Order*, 11 FCC Rcd at 9767, citing *Peterson v. Department of Interior*, 899 F.2d 799, 813 (9th Cir.), cert. denied, 498 U.S. 1003 (1990).

^{27/} *Id.*

Finally, ISTA's contention that once the Commission uses competitive bidding to license one portion of the spectrum, the Commission is barred from authorizing use of another portion of the spectrum for the provision of competitive services,^{28/} flies in the face of the Commission's policy of affording licensees in many services, *including IVDS licensees*, increased flexibility in the use of their spectrum.^{29/} It is passing strange that IVDS licensees would object to the Commission affording any service provider increased flexibility, since the IVDS community has previously convinced the Commission to amend its rules to allow IVDS licensees to provide mobile services — mobile services that can compete with PCS providers that had already been licensed by auction.^{30/} One must ask whether ISTA believes it was akin to fraud, a violation of commercial law, or a taking of property without just compensation for the Commission to grant IVDS licensees the right to provide mobile services after the Commission had auctioned mobile PCS authorizations? The situation here is indistinguishable from that which occurred when the Commission authorized IVDS licensees to

^{28/} See ISTA Comments, at 2 (“While the present licensing scheme undergirded by an auction program may likewise not confer any property rights *per se* upon successful bidders who become licensees, it certainly engenders an expectation of at least near-term consistency with regard to the value the Commission ascribes to the spectrum to be offered prior to the commencement of the auction of same. Radical changes to the permitted uses of the spectrum auctioned — *or to other portions of the spectrum previously licensed and/or auctioned* — may vastly undermine that expectation, as well as the confidence necessary for future bidders to make reasoned judgments about Commission auctions.”).

^{29/} See *infra* at 17.

^{30/} See *Amendment of Part 95 of the Commission's Rules to Allow Interactive Video and Data Service Licensees to Provide Mobile Service to Subscribers*, 10 FCC Rcd 4981 (1995)[hereinafter “*IVDS Order*”]. This was not the first time the Commission amended its IVDS rules after the auction. The Commission amended its rules to eliminate the one-year build-out requirement that had been imposed upon IVDS licensees in order to “permit IVDS licensees to provide new and innovative communication services.” *Amendment of Part 95 of the Commission's Rules to Modify Construction Requirements for Interactive Video and Data Service (IVDS) Licenses*, 11 FCC Rcd 2472 (1996).

provide mobile services after the Commission had auctioned mobile PCS licenses. Unless IVDS licensees are now prepared to forego the benefits of mobile authorizations, they can hardly complain here.

2. *The Commission Should Reject WebCel's Call For The Commission To Artificially Boost LMDS Auction Values By Abandoning The Commission's Commitment To Regulating ITFS and MDS In The Public Interest.*

Although WebCel stands on different footing than ISTA (WebCel is not even a Commission licensee, just a potential participant in the LMDS auction), its objective is no different. Like ISTA, WebCel's goal is to have the Commission protect WebCel from competition for financing and for marketplace acceptance by keeping MDS and ITFS licensees hamstrung with obsolete technical rules. And, just as the Commission should reject ISTA's efforts to hide from competition, so too should the Commission reject WebCel's.

Stripped of its rhetoric and inaccuracies, WebCel's filing argues that the Commission should ignore the public interest benefits of affording MDS and ITFS licensees increased flexibility in order to bolster the value of the LMDS spectrum that will be auctioned later this year. Yet, WebCel is hardly worried about reduction of the national debt -- rather, WebCel is attempting to bolster its own efforts at fund-raising. As WebCel candidly concedes, the capital markets will be less willing to fund WebCel if it will face significant competition in the provision of wireless broadband services.^{31/} Yet, WebCel's fund-raising difficulties are of no relevance to the question at hand — whether the proposed rules advance the public interest in strong, viable MDS and ITFS services.

^{31/} See WebCel Comments, at 3-4.

Contrary to WebCel's arguments, the Commission should not, and cannot, ignore the specific benefits that will accrue to the public through providing MDS and ITFS licensees with the technical flexibility to make productive use of their spectrum.^{32/} While WebCel would have the Commission believe that wireless cable operators do not require two-way capabilities in order to remain competitive,^{33/} the marketplace says otherwise. Just two weeks ago, for example, Continental Cablevision, the nation's third-largest cable MSO, changed its name to MediaOne and branded the company as a "broadband services company."^{34/} According to *MultiChannel News*, Amos B. Hostetter, Jr., Chief Executive Officer of MediaOne, explained that:

the renamed company would "define a whole new industry — broadband," which he described as a "powerful two-way wire" that can deliver computer, television and telephone services to the home.

According to *Cable World*:

To make [MediaOne's new motto, "This is Broadband, This is the way"] a reality, the company will spend \$5 billion by the end of the decade to upgrade systems to 750-MHZ hybrid fiber optic/coaxial cable and provide subscribers with Internet access, advanced video and voice telephone service, as well as 150 channels of digital TV.^{35/}

This recent development, coupled with the evidence presented in the Petition,^{36/} makes clear that wireless cable operators will have to provide a broadband offering in order to compete in many

^{32/} See Petition, at 4-18.

^{33/} See WebCel Comments, at 9-10.

^{34/} See Paikert and Haugsted, "MediaOne Makes 'Broadband' Pitch, *Multichannel News*, at 1 (May 19, 1997).

^{35/} Matthews, "Continental's Shift: New Name, Strategy Debuted by MediaOne," *Cable World*, at 1, 43 (May 19, 1997).

^{36/} See Petition, at 4-16.

markets. It is telling that WebCel, which has aggressively urged the Commission to establish LMDS rules that will permit licensees to offer competitive broadband services,^{37/} would deprive MDS and ITFS licensees the technical capability of competing against the cable industry in the provision of broadband offerings.

Moreover, regardless of the immediate realities of the marketplace in which wireless cable competes, it is beyond peradventure that as a general proposition, flexibility in spectrum use is in the public interest. As Chairman Hundt noted when he testified before the House Subcommittee on Telecommunications, Trade and Consumer Protection earlier this year:

We study history so as not to repeat its failures. Spectrum policy, unfortunately, teaches us many lessons. One important lesson is that static definitions of use, whether for service or technology, are doomed to fail and will need to be changed. In nearly every service the FCC authorizes, licensees come back to the Commission to ask permission to change something. This is not ancient history, but is occurring even now, as the old regime continues its sway over Commission thinking.

Last week, Multipoint Distribution Service (MDS) licensees petitioned the Commission to gain additional flexibility so that they could provide two-way services. Why is this necessary? Shouldn't flexible use be automatic? If MDS licensees want to provide high speed two-way services, the public needs the opportunity to receive these services. This will provide competition to the cable companies and telephone companies who promise to provide the same services. We must reject the 1945 principles that would administratively evaluate the relative costs of wireless and wireline provision of these services. Rather, we need to allow licensees the flexibility to provide the high speed, high quality services that consumers demand.^{38/}

^{37/} See Reply Comments of Webcel Communications, Inc., CC Docket No. 92-297, at 18-19 (filed Aug. 22, 1996).

^{38/} Statement of Reed E. Hundt on Spectrum Management Policy before the Subcommittee on Telecommunications, Trade and Consumer Protection, Committee on Commerce, U.S. House of Representatives at 11-12 (Feb. 12, 1997). Similarly, speaking in support of flexible use, Michele Farquhar, then Chief of the Wireless Telecommunications Bureau, noted:

Given WebCel's opposition to the Petition, it is disingenuous for WebCel to ally itself with the Chairman as "a strong supporter of spectrum flexibility" that "believes that licensees are in the best position to determine the best business case for their spectrum."^{39/} What WebCel is advocating, simply stated, is that flexible use should only be available to those who secure flexible use authorizations at auction.^{40/} Yet, WebCel ignores that the Commission's spectrum flexibility policies are independent of the mechanism employed to award authorizations.

The short answer to WebCel can be found in the Commission's consistent willingness to amend its rules as necessary to provide licenses with increased flexibility *regardless of whether their licensees were secured at auction*. The Commission's rationale for permitting IVDS licensees to provide mobile services even after it had auctioned IVDS authorizations is instructive, for it illustrates precisely why the Commission should grant the Petition over the objections of WebCel. At the time the Commission expanded the flexibility afforded IVDS licensees, it expressly recognized that even once licenses have been auctioned for a given service, "[t]he public interest

^{38/} (...continued)

In nearly every service we authorize, licensees have come back to the Commission to ask to change their authorized services, or technical restrictions, or the amount of spectrum they seek to employ. Last week, for example, Multipoint Distribution Service or "MDS" licensees petitioned the Commission to gain additional flexibility so that they could provide two-way services. The same process occurred with PCS, where we neglected to permit fixed services to operate on this spectrum. And it occurred in IVDS, where we awarded additional flexibility after the first auction and are facing new petitions seeking even more flexibility.

"Putting the Key Principles of Spectrum Policy Into Practice," Keynote Address by Michele C. Farquhar before the Telecommunications Reports "Next Generation Wireless" Conference, at 8-9 (Feb. 13, 1997).

^{39/} WebCel Comments, at 8.

^{40/} *See id.*

requires, however, that we retain the discretion and responsibility to modify our service rules as the industry continues to evolve.”^{41/}

The Commission’s post-auction treatment of IVDS is consistent with the Commission’s regulatory approach to other services. For example, long after the Commission issued mobile authorizations to Cellular Radio Service, Personal Communications Services (“PCS”), Specialized Mobile Radio Service, paging, 220 MHz and for-profit interconnected business radio services (collectively, Commercial Mobile Radio Service (“CMRS”) providers) using a combination of comparative hearings, lotteries and auctions, the Commission granted all CMRS providers the flexibility to offer fixed wireless services in addition to mobile services.^{42/} In so doing, the Commission specifically rejected arguments that PCS licensees should be afforded the greatest flexibility because they received their licenses through the auction process.^{43/} Similarly, the Commission expanded the flexibility afforded all PCS licensees when it ruled that all broadband licensees (including those that had already received authorizations) could engage in geographic partitioning and spectrum disaggregation.^{44/} And, of course, when the Commission issued its July

^{41/} *IVDS Order*, 10 FCC Rcd at 4982.

^{42/} *Amendment of the Commission’s Rules To Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, 11 FCC Rcd 8965, 8973-77 (1996).

^{43/} *See id.* at 8973.

^{44/} *See Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Service Licensees*, FCC 96-474, ¶¶ 13-18, 46 (rel. Dec. 20, 1996). In so doing, the Commission rejected arguments by rural telephone companies, which had previously been the only PCS licensees permitted to engage in partitioning, for special protection from competition in securing partitioned service areas, finding that the public interest benefits of allowing all licensees to engage in partitioning outweighed any particular benefit to rural telephone companies. *See id.* at ¶¶ 13-18.

10, 1996, *Declaratory Ruling and Order* establishing policies governing the use of digital modulation by MDS and ITFS licensees, it made no effort to discriminate in favor of those licenses that were issued as a result of the MDS auction.^{45/} As these recent cases illustrate, the Commission can and should provide licensees with increased technical flexibility wherever it can, without regard to whether the licenses were issued by comparative hearing, lottery or auction.

Finally, but no less importantly, WebCel erroneously contends that when the Commission conducted its auction for available MDS frequencies, winning bidders were restricted to providing a “one-way, point-to-multipoint broadcast service that competes with incumbent cable operators.”^{46/} WebCel conveniently omits that the Commission’s rules at the time of the auction, as now, afford MDS licensees the flexibility to provide “any kind of communications service.”^{47/} Indeed, while WebCel cites liberally to the 1995 *Report and Order* in which the Commission first authorized the use of competitive bidding for awarding MDS authorizations, WebCel curiously fails to address Paragraph 59 of that decision, in which the Commission clearly stated that it would not restrict MDS licensees to the one-way transmission of video programming.^{48/} Similarly, WebCel ignores

^{45/} See *Request For Declaratory Ruling on the Use of Digital Modulation by Multipoint Distribution Service and Instructional Television Fixed Service Stations*, FCC 96-304 (rel. July 10, 1996)[hereinafter cited as “*Digital Declaratory Ruling*”].

^{46/} WebCel Comments, at 2. See also *id.* at 5 (Auction “gave winning bidders the right to construct and license facilities to provide *one-way* wireless cable service”).

^{47/} 47 C.F.R. §21.903(b). That WebCel would totally ignore this provision in crafting its argument is strange, for it was specifically discussed in the Petition, along with Commission decisions specifically providing that MDS licensees are not limited to the provision of video entertainment programming. See Petition, at 21-23.

^{48/} *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed*
(continued...)

Paragraphs 19-20 of the *Memorandum and Order on Reconsideration* in that proceeding, where the Commission further provided that:

previous MDS rulemakings have also noted that operators should be afforded the flexibility to provide other services. *See, e.g., In the Matter of Revisions to Part 21 of the Commissions Rules*, 2 FCC Rcd 4251, 4255 (1987) ("We believe a similar flexible approach is particularly appropriate to MDS In the non-entertainment market, MDS may compete with short-haul microwave, coaxial cable, Digital Termination Systems, fiber optic cable and fixed satellites."); *see also, Report and Order in the Matter of Parts 1, 2, 21, and 43 of the Commission's Rules*, 45 FCC Rcd 616, 619 n.6 (1974) ("MDS is not limited to television transmission and should be capable of many diverse forms of transmission such as the omnidirectional distribution of high speed computer data, audio, control signal, facsimile, etc.").

20. In the *MDS Report and Order* we changed none of our rules regarding the use of MDS frequencies, and we do not do so here. We will allow alternative uses other than wireless cable video transmission if the applicant can satisfy MDS technical rules or adequately support waivers of those rules. We will examine waiver requests for these uses on a case by case basis. However, we will not grant waivers of technical rules where we find that applicants merely are attempting to warehouse these frequencies. We emphasize that any party entering the MDS auction should do so with the expectation that all station license applications must protect against harmful electrical interference to incumbent MDS operations as well as ITFS receive sites and the service areas associated with channel leases.^{49/}

Given that MDS auction participants were bidding for spectrum that could be used flexibly, it is absurd for WebCel to suggest that the Commission again "put[] all MDS licenses up for auction

^{48/} (...continued)

Service, 10 FCC Rcd 9589, 9619 (1995)[hereinafter cited as "*MDS Action Order*"]. The Commission warned prospective bidders that they may need to apply for waivers of certain MDS technical rules in order to provide other services. *See id.* The Petition envisions a regulatory scheme under which the Commission can avoid the individualized decision making associated with waiving rules by regularizing rules and procedures for the processing of applications for other uses.

^{49/} *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service*, 10 FCC Rcd 13,821, 13,825 (1995).

under new, flexible service rules.”^{50/} Such a solution would not only be unworkable as a practical matter, but would require MDS auction winners to bid again for that which they have purchased once already.

In short, WebCel’s arguments are fatally flawed by its failure to acknowledge either the regulatory environment that existed when the MDS auction was conducted or the Commission’s ongoing responsibility to adjust service rules to meet changing public interest demands, without regard for potential adverse impacts on auction revenues. As such, the arguments advanced by WebCel should not deter the Commission from issuing a notice of proposed rulemaking in this proceeding.

^{50/} WebCel Comments, at 14. Both because the public interest is served by flexible use and because MDS auction participants were bidding for spectrum that the Commission had indicated could be used flexibly, WebCel’s argument that the grant of the Petition would result in a financial windfall is of no moment. *Id.* at 12-13. It is worth noting, however, that WebCel plays fast and loose with the facts when it attempts to compare the results of the MDS auction with the PCS C-Block auction to establish the value of flexible use spectrum. At the outset, because of the heavily encumbered nature of the MDS spectrum prior to the auction, it is disingenuous for WebCel to imply that the winning bidder in an MDS auction was receiving the rights to use thirteen 6 MHz channels. In most BTAs, the vast majority of MDS channels were already licensed, and the auction winner received only the “table scraps.” For example, in the Washington, DC, BTA that WebCel cites in its pleading, only four MDS channels were unlicensed prior to the auction and those channels are heavily encumbered by the obligation to protect the co-channel licensee in Baltimore from interference.

More importantly, given the well-known financial problems facing PCS C Block auction winners, the winning bids submitted in that auction can hardly be cited as indicative of true market values. Although the recent Wireless Communications Service (“WCS”) auction may also have been somewhat skewed by Congressionally mandated deadlines, it is certainly worth noting that the 0.18¢ per MHz/pop nationwide price for WCS spectrum is less than one-sixth of the 1.2¢ per MHz/pop nationwide price paid for MDS spectrum (even without adjusting the MDS auction prices for incumbent licenses encumbering the spectrum). Thus, one could certainly argue that even if MDS licensees are afforded the full flexible use afforded WCS licensees, MDS licensees will still have overpaid based on the results of the Commission’s latest auction.